[Cite as *Rabkewych v. Cleveland Bd. of Bldg. Stds. & Appeals*, 2015-Ohio-1952.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101804

MICHAEL RABKEWYCH

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND BOARD OF BUILDING STANDARDS AND APPEALS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-811752

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: May 21, 2015

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MARY J. BOYLE, J.:

{¶1} Appellant, Michael Rabkewych, appeals from a judgment of the Cuyahoga County Court of Common Pleas affirming the city of Cleveland Board of Building Standards and Building Appeals's ("Board") decision to condemn and demolish his property. He raises the following four assignments of error for our review.

> 1. The trial court erred in upholding the decision of the Board of Building Standards and Building Appeals, [which] erred in denying him additional time to abut [sic] the damage to his property.
>
> 2. The trial court erred in upholding the Board of Building Standards and Building Appeals decision granting an emergency order for the demolition of his property.
>
> 3. The trial court erred in not reversing the Board of Building Standards and Building Appeals decision which is against the manifest weight of the evidence.
>
> 4. The trial court erred by committing an abuse of discretion and affirming the decision of the Board of Building Standards and Appeals.

{¶2} Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶3} In 2003, Rabkewych purchased property located at 2439 Tremont Street, Cleveland, Ohio ("property"). On June 18, 2013, the city of Cleveland Department of Building and Housing inspected Rabkewych's property. Based upon that inspection, the director of building and housing found the property to be a "public nuisance in that it constitutes an eminent danger and peril to human life and public health, safety and welfare, and that the aforesaid condition constitutes an emergency." The city issued a

condemnation notice of violation and demolition order on June 20, 2013. The violation notice required immediate abatement of the code violations.

{¶4} On July 3, 2013, Rabkewych filed an "appeal statement" with the Board. In his appeal, Rabkewych challenged the zoning classification (he contended that it should have been classified as residential, not commercial), as well as the type of structure listed in the notice (it was listed as "2.5 Sty. Masonry"; he contended that it was only a two-story building). He further requested more time to correct the violations and asked "that the city of Cleveland cease efforts to demolish the structure."

{¶5} A public hearing was held on July 31, 2013. Four Board members, the chairman of the Board, and the executive secretary of the Board were present at the meeting. Representing the city of Cleveland at the meeting were the commissioner of building and housing, the building inspector (who inspected Rabkewych's property), the chief building official of building and housing, and the assistant director of law. Also present at the meeting were a Ward 3 area coordinator and Rabkewych. All persons present were sworn "en masse."

{¶6} At the hearing, Rabkewych testified that he owned the property at issue, which he said was "a large masonry garage." He stated that "[i]t has a lot of issues that need repair." He explained how he planned to repair the property. Rabkewych said that the day the property was inspected, he received notice of the violations. Rabkewych stated that he went "down on June 20th or 21st to fill out an application" for a permit to

repair the property, but he was denied the permit because he was told that it was a commercial structure.

{¶7} Rabkewych disputed the commercial classification. Rabkewych explained that the property used to be classified as commercial because it was originally a bakery, but that it had been a residential garage for "the past 50 years." According to Rabkewych, if the property was properly zoned residential, he could repair it himself, but a property zoned commercial had to be repaired by a licensed contractor.

{¶8} Rabkewych explained that "the county" told him that land use classification of his property was "a clerical error." Specifically, "the county" told Rabkewych that the "4390" land use code ("other food service structure") should have been "5990" ("residential garage"). Rabkewych submitted documents at the hearing to support his contention. The first document showed that on June 25, 2013, Rabkewych requested the county to change the land use code from 4390 to 5990. The document showed that drastically different taxes would be owed depending on what land use code was used. The second document, titled "Correction — Estate Valuation — Taxes," showed that the county changed the land use code from 4390 to 5990, and noted that "property was reclassified for 2012 appraisal."

{¶9} Rabkewych testified that he did not dispute the condition of the property, but he disputed the demolition. He explained that he installed "some bracing, some four-by-six bracing on the corner." He further described how he braced the wall of the structure with the "four-by-sixes."

{¶10} Rabkewych stated that he "fully intend[ed] to have drawings made up," but that "for now," he just wanted "it to be rewritten from commercial to residential." Chairman Joseph Denk responded, "[w]e're not zoning."

{¶11} Robert Santora, the city building inspector who inspected the property, explained that Rabkewych had just requested the city to change the use classification to residential after the property had been inspected.

{¶12} Tom Vanover, the city building and housing commissioner, explained that "the use of the structure is often independent of the declaration of land." Vanover further stated that this structure "is a commercial bakery." He stated that is what it was originally and there has "never been a change of use to make it a residential garage." Vanover explained that the structure is "obviously collapsing." Vanover further stated that when a structure is zoned commercial, a contractor must do the work.

{¶13} The assistant director of law for the city objected to the documents that Rabkewych submitted, arguing that the documents dealt with "taxes and not having to do with land use and the city determination of the zoning."

{¶14} David Cooper, Chief Building Official of Building and Housing, testified that "there's a great concern of residents in this area. Tremont is really densely packed with people that [the structure] should not be standing in this condition." Cooper further stated that "this didn't just happen overnight. This is property that [Rabkewych] has owned for ten years, whether he wants to call it residential or commercial." Cooper said that the structure was an "emergency and it needs to come down immediately."

{¶15} Katie Hough, Ward 3 area coordinator, testified that she was at the meeting on behalf of Councilman Joe Cimperman, the development corporation, and the adjacent property owners. She explained that one of the compromised walls of the structure "is literally maybe four feet from an occupied structure." She stated that "[i]f that wall were to collapse and those people were in their home sleeping, that is going to kill the people in the house next door."

{¶16} Thirty-three photographs of the property were submitted to the Board. One board member described the photographs as showing "serious structural issues," including a property having wall separations, two story high walls without a roof or floor joists bracing the walls, meaning they were free standing walls, other walls that needed to be stabilized, cracks over window heads, and settlement around a corner of the building where a corner of the building had dropped. The board member explained that this was a "serious hazardous condition."

{¶17} Two letters from concerned citizens were also submitted to the Board. One letter from an adjacent neighbor stated that pieces of the building, "chunks of brick, glass, roof tiles, old steel window weights and pieces of plywood," fell into his back yard. The neighbor was worried that his family could be injured or killed from "fallen debris." The neighbor opined that "this building is unsafe and beyond repairable and is ready to come down anytime."

{¶18} The second letter was written from a representative of "an ownership group." The ownership group owned adjacent property to the one at issue. According

to the letter, the ownership group had decided to demolish one of its garages that was adjacent to Rabkewych's structure. As demolition of the ownership group's garage began, it became clear that Rabkewych's structure was encroaching upon the adjacent garage "in order to buttress itself as a way to remain standing." Thus, in the interest of safety for its tenants and adjacent neighbors, the ownership group stopped demolishing its garage until after Rabkewych's garage was demolished. The ownership group urged the Board to move forward with demolition of "the condemned two-story vacant cinder block structure."

{¶19} At the end of the hearing on July 31, 2013, the Board found that the building was an imminent danger and denied Rabkewych's appeal for additional time. The Board remanded the matter to the division of building and housing for immediate action.

{¶20} On August 5, 2013, Rabkewych filed an administrative appeal of the Board's decision in the common pleas court.

{¶21} On August 6, 2013, Rabkewych moved for a stay of execution of the Board's decision and for a temporary restraining order, asking the common pleas court to stop the demolition of his property. In a short handwritten journal entry, the court ordered "motion for temporary restraining order granted until 8/8/2013 — hearing 8/7/13 3:00 p.m. Courtroom 16(D) The Justice Ctr."

{¶22} On August 7, 2013, Rabkewych filed a motion to show cause, requesting an order compelling the city to show why it should not be held in contempt of court for violating the temporary restraining order. Rabkewych explained that he "handed a copy

of the temporary restraining order to the foreman of [the] demolition crew," and approximately 20 minutes later, the demolition crew "resumed demolition, and tore down approximately one-third of the building."

{¶23} The city responded on August 22, 2013, opposing Rabkewych's motion to show cause. The city explained that the motion to show cause was moot as the property had been demolished. The city further argued that the short, handwritten journal entry granting Rabkewych's motion for temporary restraining did not comply with Civ.R. 65(C), because Rabkewych failed to post bond "executed by sufficient surety," and Civ.R. 65(D), because the order was not specific and it did not "set forth the reasons for its issuance." Thus, the city asserted that the temporary restraining order was not valid.

{¶24} The trial court denied Rabkewych's motion to show cause and his motion for stay of execution, finding them to be moot.

{¶25} The city and Rabkewych filed briefs with the common pleas court. The city moved to strike all documents that were attached to Rabkewych's brief that were not submitted to the Board. The common pleas court granted the city's motion to strike, finding that Rabkewych did not comply with R.C. 2506.03.

{¶26} On July 17, 2014, the common pleas court affirmed the decision of the Board. It is from this judgment that Rabkewych appeals. Although Rabkewych raises four assignments of error, he fails to argue them separately. Although we have the discretion under App.R. 12(A)(2) to disregard assigned errors that are not argued separately, we will address his arguments together as he does and in the interest of justice.

Standard of Review

{¶27} Common pleas courts and appellate courts apply different standards of review to appeals brought pursuant to R.C. Chapter 2506. R.C. 2506.04 provides that if a party appeals an administrative decision, the common pleas court "may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04 further provides that the common pleas court judgment "may be appealed by any party on questions of law."

{¶28} The Ohio Supreme Court has explained:

> "In an R.C. Chapter 2506 administrative appeal of a decision of the board of zoning appeals to the common pleas court, the court, pursuant to R.C. 2506.04, may reverse the board if it finds that the board's decision is not supported by a preponderance of reliable, probative and substantial evidence. *An appeal to the court of appeals, pursuant to R.C. 2506.04, is more limited in scope and requires that court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence*."

(Emphasis sic.) *Cleveland Clinic Found. v. Bd. of Zoning Appeals of the City of Cleveland*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 23, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984).

{¶29} Whether the common pleas court abused its discretion is "[w]ithin the ambit of 'questions of law'" in R.C. 2506.04 administrative appeals. *Kisil* at fn. 4.

Analysis

{¶30} "[I]t is well settled that municipal ordinances enacted pursuant to R.C. 715.26 are a valid exercise of police power." *Cleveland v. W.E. Davis*, 8th Dist. Cuyahoga No. 69915, 1996 Ohio App. LEXIS 3103, *17 (July 18, 1996), citing *State ex rel. Eaton v. Price*, 105 Ohio App. 376, 388, 152 N.E.2d 776 (2d Dist.1957).

{¶31} Where a city, however, "has failed to provide a property owner with an opportunity for hearing or appeal prior to the razing of property, the city has denied the owner due process of law. *Id.* citing *Superior Sav. Assn. v. Cleveland*, 501 F. Supp. 1244, 1250 (N.D.Ohio 1980).

{¶32} R.C. 715.26 provides in relevant part that any municipal corporation may:

> (B) Provide for the inspection of buildings or other structures and for the removal and repair of insecure, unsafe, or structurally defective buildings or other structures under this section or section 715.261 of the Revised Code. At least thirty days prior to the removal or repair of any insecure, unsafe, or structurally defective building, the municipal corporation * * * shall give notice by certified mail of its intention with respect to such removal or repair * * * to owners of record of such property. * * * If an emergency exists, as determined by the municipal corporation, notice may be given other than by certified mail and less than thirty days prior to such removal or repair. * * *

{¶33} The city of Cleveland enacted the following relevant ordinances to address a public nuisance, and in particular, a public nuisance that is deemed an unsafe structure.

{¶34} Cleveland Codified Ordinance ("C.C.O.") 3103.09 sets forth provisions for unsafe structures. It provides in relevant part:

> (b)(1) [Declaration of Nuisance] All buildings or structures that are injurious to or a menace to the public health, safety or welfare, or are structurally unsafe, unsanitary or not provided with adequate safe egress, or constitute a fire hazard, or are vacant and open to public entry, or are otherwise dangerous to human life or injurious to the public, or in relation

to existing use constitute a hazard to the public health, safety or welfare by reason of inadequate maintenance, dilapidation, obsolescence or abandonment, are, severally, for the purposes of this Building Code, declared to be "unsafe structures." All unsafe structures or conditions are declared to be public nuisances. The public nuisance shall be abated by correction of the violations to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, applicable City rules and regulations, the Revised Code, and Ohio Administrative Code, including the Ohio Building Code, or by demolition.

(d)(3) [Examination and Condemnation] The Director may also declare that a nuisance structure which, due to its advanced state of dilapidation, substantial fire damage or structural infirmity, is an immediate hazard to human life or health, may only be abated by immediate repair and rehabilitation to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, applicable City rules and regulations, the Revised Code, and Ohio Administrative Code, including the Ohio Building Code, or by demolition.

(e)(1) [Notice of Violation] Whenever the Director finds a building, structure or a portion of those to be unsafe and determines it or the property on which it is located to be a public nuisance as defined in this chapter, he or she shall forward by certified mail to the owner, agent or person in control of the building, structure or portion and to any mortgagee of record a written notice of violation stating the defects in the building or structure. The notice of violation shall require the owner within a stated time to abate the nuisance condition of the building or structure by correction of the violations and defects to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, applicable City rules and regulations, the Revised Code, and Ohio Administrative Code, including the Ohio Building Code, or by demolition and removal of the building, structure, or a portion of those. The notice also shall state that if the nuisance is not abated within the required time that the Director may take appropriate action to repair, remove, or otherwise abate the public nuisance and that the owner, agent or person in control shall be responsible for the costs. The handing of the violation notice to the owner, agent or person in control of the building, structure or a portion of those shall be deemed actual notice and is legal and valid service and no other form of service is necessary.

(h)(6) [Notice of Intent to Demolish] Except as provided in division (1) of this section, the Director shall give written notice informing the owner, agent, or person in control, mortgagee of record and lien holders of record

> of the City's intention to demolish and remove the unsafe building or structure at least thirty (30) days before the intended action by the City. The notice may be effective concurrently with the violation notice. A condemned structure, once effectively boarded by the owner pending rehabilitation that later becomes open to entry, may then be demolished and removed, subject to the Director giving written notice as stated in divisions (e)(1) and (h) of this section, upon a finding by the Director that the structure can no longer be effectively boarded.
>
> (j) [Cases of Emergency] In cases of emergency that, in the opinion of the Director, involve immediate danger to human life or health, the Director shall promptly cause the building, structure or a portion of those to be made safe or removed. For this purpose he or she may at once enter the structure or land on which it stands, or any abutting land or structure, with assistance and at the cost as he or she deems necessary. He or she may request the Director of Public Safety to enforce the orders he or she gives that are necessary to cause the building, structure or a portion of those to be made safe or removed. The Director of Public Safety has the authority to enforce the orders. He or she may order adjacent structures and premises to be vacated, and protect the public by an appropriate fence or other means as may be necessary, and for this purpose may close a public or private way.

{¶35} The city presented evidence that Rabkewych's structure was a public nuisance because it was an unsafe structure and an immediate danger to human life — a finding that Rabkewych did not contest. Accordingly, pursuant to C.C.O. 3103.09, the city had the right to immediately demolish the property.

{¶36} Rabkewych argues that the trial court erred when it denied his request to expand the evidence in the record under R.C. 2506.03. This provision provides:

> (A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

> (1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.
>
> (2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:
>
> (a) Present the appellant's position, arguments, and contentions;
>
> (b) Offer and examine witnesses and present evidence in support;
>
> (c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;
>
> (d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;
>
> (e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
>
> (3) The testimony adduced was not given under oath.
>
> (4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.
>
> (5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.
>
> (B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

{¶37} R.C. 2506.03(A) explicitly states that the trial court shall be confined to the transcript from the hearing unless it appears, *on the face of the transcript* or by affidavit filed by appellant, that one of the provisions listed applies. Here, it is clear on the face of the transcript that none of the provisions from R.C. 2506.03(A)(1) through (5) applies.

Accordingly, the trial court did not err when it limited its review to the transcript of the hearing.

{¶38} Rabkewych further argues that the common pleas abused its discretion when it affirmed the Board's decision. Again, whether the common pleas court abused its discretion is within the ambit of questions of law that we review in an administrative appeal. *Kisil*, 12 Ohio St.3d at fn. 4, 465 N.E.2d 848.

{¶39} In this case, the trial court found:

> The issue at the board hearing was condemnation. Appellant requested time to abate and repair the structure. However, when appellant was advised that the property was commercial, which required a licensed contractor to submit drawings and plans for the work, appellant failed to make application for a permit to make repairs. Although appellant disputed the commercial designation and provided evidence the occupancy use was in fact residential, the Board ruled that additional time would not abate the immediate danger to the public. After reviewing the record, this Court cannot find the decision is unconstitutional, illegal, capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable, and probative evidence.

{¶40} We disagree with Rabkewych that the common pleas court abused its discretion in affirming the Board's decision because the court is correct that there is nothing in the record to show that the Board's decision was unconstitutional, illegal, arbitrary, capricious, or unreasonable, and it was also supported by a preponderance of substantial, reliable, and probative evidence. Notably, Rabkewych never challenged the Board's finding that his property was an unsafe structure. Nor did he contend that he was not afforded notice or an opportunity to be heard. He merely asserted that he needed additional time to repair the issue, which we will address below.

{¶41} Rabkewych makes several other arguments regarding the Board's decision, without reference to the common pleas court's decision in upholding the Board's decision. While we refer to his arguments as he frames them for ease of discussion, we keep in mind our limited standard of review. Again, we will affirm the common pleas court's decision if we find that it is supported by a preponderance of reliable, probative, and substantial evidence.

{¶42} Rabkewych argues that the Board erred when it denied him additional time to repair the structure. We disagree. Rabkewych owned the property for at least ten years at the time of the hearing. The property did not become in such disrepair overnight. Moreover, additional time would not have made the property immediately safe to human life.

{¶43} Rabkewych argues that his property was wrongly classified as commercial. This argument, however, involves zoning. Again, Rabkewych owned the property for ten years. He should have applied for a zoning change to the zoning board before his property was condemned.

{¶44} Rabkewych claims that he attempted to obtain permits to fix his property, but was denied. He argues that he should have been permitted to repair the structure himself because it was actually a residential garage. He argues that the evidence he submitted at the hearing proves this. The documents that Rabkewych submitted at the hearing, however, were county tax documents, not zoning documents.

{¶45} Rabkewych asserts that because he reinforced the walls, it was not in imminent danger of collapse. But Rabkewych did not present any evidence from a contractor or engineer establishing that the property was not an unsafe structure. Indeed, the photos taken by the city show that the structure is still crumbling around the braces installed by Rabkewych. Further, Rabkewych did not assert that the structure was safe in his appeal statement or at his hearing in front of the Board.

{¶46} Rabkewych further argues that the Board failed to issue findings of fact and conclusions of law. We disagree. The Board found the structure to be an "imminent danger."

{¶47} We will not address Rabkewych's manifest weight of the evidence arguments as we are not permitted to weigh the evidence.

{¶48} After review, we conclude that the decision of the common pleas court is supported by a preponderance of reliable, probative, and substantial evidence.

{¶49} Accordingly, Rabkewych's four assignments of error are overruled.

{¶50} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR